



In the Matter of

Digital Performance Right in Sound  
Recordings and Ephemeral  
Recordings

Docket No. 99-6 CARP DTRA

LIBRARY  
OF  
CONGRESS

## ORDER

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On September 27, 1999, the Copyright Office published a Notice in the **Federal Register** announcing the schedule for the Copyright Arbitration Royalty Panel ("CARP") proceeding to set rates and terms for the section 112 statutory license (which allows a transmitting organization to make ephemeral recordings of a sound recording for the purpose of making a permitted public performance) and the section 114 statutory license (which allows certain eligible nonsubscription services to perform sound recordings publicly by means of digital audio transmissions). The Notice directed parties interested in participating in the above-captioned proceeding to file a Notice of Intent to Participate no later than November 1, 1999.<sup>1</sup>

The Library has received seven motions from parties seeking to file untimely Notices of Intent to Participate. They are: AEI Music Network (filed 11/2/99); iCAST (filed 11/3/99); Virgin E-Commerce (US), Inc. (filed 11/3/99); Blue Tape, LLC d/b/a Sputnik7.com (filed 11/3/99); Everstream, Inc. (filed 11/12/99); Launch Media, Inc. (filed 11/12/99); and BET.com, LLC (filed 11/12/99). RIAA does not object to the late-filed Notices of AEI Music Network, iCAST, Virgin E-Commerce (US), Inc. and Blue Tape, LLC d/b/a Sputnik7.com. There being no objection to these parties, their motions are granted.

RIAA does, however, object to the late-filed Notices of Everstream, Inc. ("Everstream"), Launch Media, Inc. ("Launch Media") and BET.com, LLC ("BET.com"). RIAA asserts that unlike the other four companies, which filed their Notices only one or two days late, Everstream, Launch Media and BET.com filed their Notices almost two weeks late. RIAA stresses that the Library must enforce its announced November 1 deadline against these three parties--and any other parties that may seek to enter the proceeding at a later date--otherwise RIAA will not be able to adequately prepare its case.

### Discussion

The Library considers motions to accept late-filed Notices of Intent to Participate on a case-by-case basis. A late-filed Notice is evaluated under a two-part test: 1) the disruption to the proceeding caused by allowing the moving party to participate; and 2) good cause for accepting the late-filed Notice. Order in Docket No. 99-3 CARP DD 95-98 (August 5, 1999). Disruption to the proceeding is considered according to the amount of prejudice caused to the other parties by allowing the moving party into the proceeding--such as its impact on settlement negotiations or preparation of written direct cases--as well as the impact on the Library's preparation for the arbitration proceeding. Good cause is evaluated according to several factors, including the harm

<sup>1</sup> In addition to requesting Notices of Intent to Participate, the Office invited interested parties to comment on the petition of the Recording Industry Association of America ("RIAA") requesting this proceeding. Such comments are considered to be a part of, rather than separate from, the Notice of Intent to Participate for purposes of this Order.

caused by denying the late-filed Notice, the soundness of the reasons offered by the moving party as to why the Notice was late, and the moving party's prior record for timely complying with Library filing requirements. In circumstances where the likelihood of prejudice to the parties is cognizable and significant, the burden is on the moving party to make a strong showing of good cause. Id.

The disruption caused to this proceeding by granting the motions of Everstream, Launch Media and BET.com is minimal and insignificant. The proceeding is at the most preliminary of stages; no assertions are made that settlement negotiations have been seriously disrupted; and no specific assertions are made that the preparations for written direct cases have been compromised. In fact, RIAA has itself asked for a postponement of the January 18, 2000, deadline for filing written direct cases. Motion of RIAA to Extend Time for Filing Direct Cases, filed November 23, 1999.

Given the absence of disruption to the proceeding, there need not be a strong showing of good cause. The Library finds that Everstream, Launch Media and BET.com have met this burden by highlighting their confusion between the filing of Notices of Intent to Participate and the filing of initial notices of digital transmission, no record of prior late-filed pleadings, and the harm caused these parties by denying their motions. Consequently, the Library is granting their motions.

In closing, the Library notes RIAA's concern that other parties may seek to enter this proceeding at a future date and RIAA's suggestion that a definitive cut-off date should be determined for this proceeding. Should such parties seek entrance into this proceeding, the Library will evaluate their requests, as well as any other late-filed pleadings, according to the two-part test discussed in this Order. Should their entrance pose a demonstrable disruption to these proceedings, then a much greater showing of good cause will be required than was demonstrated in this exchange before such a motion will be granted.

Wherefore, **IT IS ORDERED** that the motions to accept late-filed notices of intent to participate of AEI Music Network; iCAST; Virgin E-Commerce (US), Inc.; Blue Tape, LLC d/b/a Sputnik7.com; Everstream, Inc.; Launch Media, Inc.; and BET.com, LLC **ARE GRANTED.**

**SO ORDERED.**

Marybeth Peters  
Register of Copyrights

By: \_\_\_\_\_

William J. Roberts, Jr.  
Senior Attorney

**DATED:** November 30, 1999